BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLENDA E. LATHROP Claimant	)	
VS.	)	
DUCKWALL-ALCO STORES, INC. Respondent	)	Docket No. 1,024,785
AND	)	
LIBERTY MUTUAL FIRE INS. CO. Insurance Carrier	)	

ORDER

Claimant requests review of the January 25, 2006 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's requested temporary total disability compensation and medical treatment. The ALJ found that claimant's falls did not arise out of her employment at respondent but were attributable to a personal medical condition that was not aggravated or accelerated by her employment.

Claimant argues that her medical condition and need for care is a work-related aggravation of her preexisting back condition. She claims that her fall at work on January 18, 2005, was due to leg weakness following strenuous work activities. The fall caused a malfunction of her dorsal column stimulator, which caused additional back pain and leg weakness, which led to more falls. She also claims that her work activities violated her work restrictions and caused back pain and weakness, also causing or contributing to her falls. Claimant requests that Dr. Steven Peloquin be authorized as her treating physician and that temporary total disability benefits be awarded if Dr. Peloquin takes her off work.

Respondent and its insurance carrier (respondent) deny that claimant met with personal injury by accident which arose out of her employment with respondent. Respondent also contends that claimant is not entitled to temporary total disability benefits because no doctor has given her an off-work slip taking her off work for any period of time

and because her condition is permanent, not temporary. Accordingly, respondent requests that the ALJ's Order be affirmed. Respondent also argues that the admission of medical records as exhibits at the Preliminary Hearing was improper as, despite repeated requests to claimant's attorney, respondent's attorney had not been provided with copies of the records before the hearing where they were offered for admission.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the Board finds that it is without jurisdiction on an appeal from a preliminary hearing order to review the issues concerning the admissibility of evidence and whether claimant is temporarily and totally disabled, but the ALJ's finding that claimant failed to prove she suffered injury by accidents arising out of her employment is affirmed.[1]

Claimant began working for respondent as an administrative secretary in September 2003. At the time she was hired, respondent knew she had a preexisting back condition, and she was receiving Social Security disability benefits. Claimant had a back fusion in 1993. She had been on crutches for about six to seven months after this surgery. She had an additional back surgery in 1995. In 1996, while working for Sienna Homes, she suffered a workers compensation accident and injured her low back. In April 2000, claimant had a dorsal column stimulator installed, which enabled her to function better. She progressed to a point where she could stand at her kitchen sink and do dishes, iron, vacuum, walk her dogs, and eventually return to gainful employment. Before the dorsal column stimulator was installed, she had been on a series of narcotic drugs, including morphine, to combat her back pain.

On January 18, 2005, claimant was sent to the warehouse to inventory a section for a buyer. She pulled boxes weighing up to approximately 50 pounds each off a shelf, pulled merchandise out of the boxes, checked UPC codes, repacked the boxes, and restacked them. When she left the warehouse, she walked about 25 feet and had weakness and pain in her back and legs. She had to sit down and rest about 25 to 30 minutes before being able to walk back to her desk. She told her supervisor that she had been to the warehouse and was having problems with her legs being weak. When she initially described the incident during her Preliminary Hearing testimony, claimant did not say she fell on January 18, 2005. Her later testimony, however, refers to a fall at work in January and to the "fall" on that date.

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[1] The Brief of Claimant filed February 17, 2006, refers to a January 6, 2006, discovery deposition of claimant. However, no such transcript is contained in the administrative file. K.S.A. 44-555c(a) provides that "[t]he review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." As that deposition was apparently not part of the record considered by the ALJ, it will not be considered by the Board. *See* P.H. Trans. (Jan. 18, 2006) at 11.

Claimant testified that even though her supervisor knew about her fall on January 18 and her weak legs, she was sent to the warehouse more and more frequently. She continued to work from January through April and claims she continued falling, including one time when she fell while going to the restroom. Her last fall at work occurred in April 2005. She was sitting at her desk and stood up to walk around a file cabinet. She took approximately six steps and fell to the floor. She described this as her worst fall and said she was on the floor about ten minutes before she was able to get up. She returned to work after this fall but was terminated on April 28, 2005.

Claimant visited Dr. William Short on January 19, 2005, the day after her first fall at respondent. Dr. Short's record for that day states:

> [Claimant] says that she has been falling recently. Says her legs just don't seem to do what her mind tells them to. She is having, of course, her chronic pain. Denies any dizziness, lightheadedness, discoordination. It is just that sometimes her legs give out and she falls. She has had one back surgery and also has a dorsal column stimulator in her back.[2]

Claimant was involved in an automobile accident on April 5, 2005. She claimed she was not severely hurt but did injure her neck and shoulder area.

Claimant was referred to Dr. Ali Manguoglu and first saw him on April 20, 2005. Dr. Manguoglu recommended L-2-3-4 decompressive laminectomies, foraminotomies and fusion. This surgery was performed in May 2005. While recuperating from this surgery, claimant apparently fell in the office of her surgeon and complained of more back pain.

In August 2005, claimant was involved in another automobile accident when the car she was driving was hit by a deer. She testified that she did not physically get hurt in this accident but only went to see Dr. Manguoglu to be sure her recent surgery had not been compromised. However, on August 17, 2005, a letter from Dr. Manguoglu to Dr. Short mentions claimant's accident with a deer and indicated that since the accident, she was complaining of difficulty controlling her bowel and bladder and significant right leg pain, as well as pain on the left side. At this time, Dr. Manguoglu recommended claimant have a lumbar MRI scan and lumbar spine x-rays. The MRI scan showed multilevel, degenerative changes of claimant's disks but showed a wide central canal. Dr. Manguoglu stated there was not much more that could be done surgically and released claimant from treatment on September 14, 2005. In a letter to claimant's attorney dated November 8, 2005, Dr. Manguoglu stated that he believed "the multiple falls at work aggravated/ accelerated/accentuated [claimant's] pre-existing back condition."[3]

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[2]P.H. Trans., Cl. Ex. 4 at 5.

[3]P.H. Trans., Cl. Ex. 3.

Claimant is requesting that Dr. Peloquin be authorized as her treating physician. Claimant first saw Dr. Peloquin on January 12, 2004. Although she testified that she did not have any problem with her dorsal column stimulator before her fall on January 18, 2005, the medical records from Dr. Peloquin of January 12, 2004, show that claimant was complaining that

> her dorsal column stimulator is not stimulating her in the correct places. . . . [I]n November [2003] she started getting more stimulation in the left lower quadrant of her abdomen and kind of a grabbing sensation. We advised her that's usually secondary to the lead having migrated down into what we call the gutter on the side of the epidural space and that's on her left side.[4]

Claimant again saw Dr. Peloquin on January 26, 2005, about a week after her January 18 fall. His records of that date indicate:

> We recently reprogrammed her stimulator in January of last year. We had determined at that time that one of the leads had migrated off to the side and was giving her abdominal wall stimulation. We turned that lead off. The other lead we are able to get left leg stimulation and also some mild right leg stimulation, which was helpful. However, recently she says she can get no stimulation, even though she has changed the battery in her hand-held programmer, therefore we think the battery is probably dead in the generator. She is also complaining that she is starting to fall a lot more. Prior to the stimulator being placed she had a lot of problems with falling. The stimulator was placed and the falling episodes seemed to diminish but now they have returned.[5]

Dr. Peloquin again reprogrammed claimant's dorsal column stimulator, and his medical record of February 16, 2005, indicates that claimant was getting stimulation pattern in the correct areas of her pain but it was not providing relief. Dr. Peloquin prescribed various narcotic pain relievers. On July 18, 2005, claimant received right and left sacroiliac joint injections. She was to return in three to four weeks for another series of injections. There is no record in the file of a return visit or any indication whether claimant received any relief from the injections she received on July 18.

Claimant testified on direct examination that she did not remember using crutches at work at respondent before her fall on January 18, 2005. Later, upon questioning by the ALJ, she stated she used crutches at work in 2004 off and on, but it was not an everyday occurrence. She testified that after her January 18 fall, Dr. Peloquin prescribed a different type of crutches for her, platform crutches. However, the prescription for the platform crutches was dated January 17, 2005, one day before claimant's fall.

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[4]P.H. Trans., Cl. Ex. 2 at 77.

[5]P.H. Trans., Cl. Ex. 2 at 71.

Claimant admits she has never presented respondent with an off-work slip from any of the doctors she has seen. She had never asked respondent to pay for any of her medical bills, and she claimed her 2005 surgery and treatment under her personal health insurance.

Between January and April 2005, claimant suffered a series of falls at work. Because these accidents occurred while claimant was at work, the accidents occurred in the course of claimant's employment. However, an accident must also arise out of the employment before it is compensable under the Kansas Workers Compensation Act.[6]

The phrase "out of" employment points to the cause or origin of the worker's accident and requires some causal connection between the accident and the employment. An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[7]

In *Hensley v. Carl Graham Glass*,[8] the Kansas Supreme Court adopted a risk analysis whereby it categorized risks into three categories: (1) those distinctly associated with the job; (2) risks that are personal to the workman; and (3) neutral risks which have no particular employment or personal character. "[P]ersonal risks do not arise out of the employment and are not compensable."[9]

The medical evidence shows that the claimant's back pain and leg weakness were not a new problem. But, even though claimant had a preexisting condition, there was evidence that her work activity would aggravate it. Nevertheless, a direct causal connection between the work and the falls has not been established. Furthermore, it is difficult to distinguish this case from *Martin*, in that it was not clear that almost any everyday activity would have a tendency to aggravate claimant's preexisting condition and thus constitute a personal risk. The medical evidence, while equivocal on this point, suggests a direct causal relationship between the preexisting condition and the falls. It is not clear that her falls occurred because of particularly strenuous activity at work. Furthermore, claimant has failed to prove that her injuries were due to the falls as opposed to other accidents and activities or even a natural progression of the preexisting condition.

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[6] *See Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, Syl. ¶ 4, 899 P.2d 1058 (1995).

[8] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979)

[9] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 299, 615 P.2d 168 (1980).

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated January 25, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2006.

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BOARD MEMBER

c: Patrik W. Neustrom, Attorney for Claimant
Bruce L. Wendel, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director